Supreme Court, U.S.
FILED
OCT 26 1994
OFFICE OF THE CLERK

94-501

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents,

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

LON J. DALE
MILODRAGOVICH, DALE, STEINBRENNER & BINNEY, P.C.
P.O. Box 4947
Missoula, Montana 59806-4947
(406) 728-1455
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The Court Should Grant the Petition to Resolve the Question as to the Parameters of Tribal Courts' Civil Adjudicatory Jurisdiction Over Non-Indians Found on the Reservation 2

A. *Iowa Mutual* Presumption Is Without Authority and Results in Avoidance of Analysis .. 2

B. Citation to Public Law 280 Authority is Inapplicable 5

C. Tribal Sovereignty Unaffected by Activities of the Litigants 6

II. No Authority Cited for Supplemental Jurisdiction 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Brendale v. Confederated Tribes & Bands of the Yakima Nation, 492 U.S. 408 (1989).....1, 2

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) ...1, 2

Larrivee v. Morigeau, 184 Mont. 187, 602 P.2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980)..... 7

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, 425 U.S. 463 (1976) ...3, 4

Montana v. United States, 450 U.S. 544 (1981) 2, 7

National Farmers Union v. Crow Tribe, 471 U.S. 845 (1985)..... 7

STATUTES

Public Law 280 (18 U.S.C. § 1162) 5

CONSTITUTION, STATUTES, AND REGULATIONS

Ordinance No. 36-B, Amendment No. 4..... 6

Tribal Law and Order Code..... 5

No. 94-510

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents,

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

The Respondents and the Intervenor avoid any discussion of this Court's ruling in *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408, at 427 n.10 (1989), pertaining to the inapplicability of the presumption language of *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and continue to attempt to avoid the sovereignty issue by reliance on a presumption of jurisdiction

that this Court has specifically ruled is "misplaced." *See* Petitioner's Brief, pp. 12-13.

In regard to the supplementary jurisdictional issue, the Respondents' and the Intervenor's briefs are void of any statutory or case authority supporting the extension of supplemental jurisdiction to tribal courts.

I. The Court Should Grant the Petition to Resolve the Question as to the Parameters of Tribal Courts' Civil Adjudicatory Jurisdiction Over Non-Indians Found on the Reservation.

A. *Iowa Mutual* Presumption Is Without Authority and Results in Avoidance of Analysis.

Respondents' and Intervenor's arguments highlight the very reason that this Court should grant the Petition. Both the Respondents and the Intervenor Confederated Salish and Kootenai Tribes of the Flathead Nation ("Tribe") rely heavily on the utilization of a presumption from *Iowa Mutual*, to support their argument that tribal jurisdiction exists over a non-Indian for civil adjudicatory jurisdiction. Respondents' Brief, p. 3; Intervenor's Brief, p. 11. The Respondents and Intervenor do not address this Court's ruling that reliance upon the presumption language of *Iowa Mutual* is misplaced, as this Court has already determined in *Brendale*, 492 U.S. 408, 427 n.10 (1989), *see* Petitioner's Brief, pp. 12-13.

The Intervenor attempts to circumvent the *Brendale* abrogation of the *Iowa Mutual* presumption language by arguing that *Brendale* and *Montana v. United States*, 450

U.S. 544 (1981), should be distinguished because the decisions involved civil regulatory jurisdiction over non-Indian use of fee lands on the Reservation. Intervenor's Brief, p. 20. No such distinction concerning civil jurisdiction over non-Indians is present in any of this Court's decisions pertaining to tribal court jurisdiction over non-Indians. The Intervenor proceeds to argue that, without reference to the demographics of the Flathead Indian Reservation, this Court lacks the necessary factual information to reach a decision concerning civil adjudicatory jurisdiction. Intervenor's Brief, pp. 20-21. The demographics of the Flathead Reservation are potentially important to this Court's understanding of the significant daily conflicts that exist concerning the parameters of jurisdictional authority between the State of Montana and the Tribal Court. This Court has addressed the demographics of the Flathead Reservation in a previous decision. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation*, 425 U.S. 463 (1976). Therefore, by judicial notice, this Court should be apprised of the history of the Flathead Reservation and the significant non-Indian activity within the external boundaries of the Flathead Reservation.

> In 1855 an expanse of land stretching across the Bitter Root River Valley and within the then Territory of Washington was reserved for "the use and occupation" of the "confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians," by the Treaty of Hell Gate, which in 1859 was ratified by the Senate and proclaimed by President Buchanan. 12 Stat. 975. Slightly over half of its 1.25 million acres is now owned in fee, by both Indians and non-Indians;

most of the remaining half is held in trust by the United States for the Tribe. Approximately 50% of the Tribe's current membership of 5,749 resides on the reservation and in turn composes 19% of the total reservation population. Embracing portions of four Montana counties – Lake, Sanders, Missoula, and Flathead – the present reservation was generally described by the District Court:

> The Flathead Reservation is a well-developed agricultural area with farms, ranches, and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominantly Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.
>
> As Montana citizens, members of the Tribe are eligible to vote and do vote in city, county and state elections. Some hold elective and appointed state and local offices. All services provided by the state and local governments are equally available to Indians and non-Indians. The only schools on the Reservation are those operated by school districts of the State of Montana. The State and local governments have built and maintain a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction. 392 F. Supp. 1297, 1313 (1975).

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 466 (1976). Since 1975, the

demographics of the Reservation have not significantly changed. The tribal members continue to be a minority within the Reservation. The extent and parameters of jurisdictional authority of the tribal court and the state court in civil matters related to non-Indians remains uncertain and undefined. It is the justifiable expectation of non-Indians within the Reservation that their affairs will be governed by the state judicial system. However, the tribal court's position in regard to civil adjudicatory matters is that it has jurisdiction over all matters relating to the Reservation. *See* citation to Tribal Law and Order Code, Intervenor's Appendix 2, App. 7.

B. Citation to Public Law 280 Authority is Inapplicable.

The Tribe, as the Intervenor, argues extensively in its brief in opposition concerning Public Law 280 (18 U.S.C. § 1162) relating to jurisdictional authority acquiesced by the tribes to the State of Montana. Public Law 280 does not have application to the parameters of tribal civil adjudicatory jurisdiction over non-Indians. Public Law 280 and the ordinances cited by the Intervenor in its appendix are inapplicable to the issue before this Court for the reason that Public Law 280 relates to the exercise of criminal jurisdiction over non-Indians by the State of Montana. Public Law 280 does not regulate civil adjudicatory jurisdiction of tribal courts over non-Indians.[1] The

---

[1] The title of Public Law 280 (18 U.S.C. § 1162) in Intervenor's Appendix 3, App. 12, clearly provides that the focus of the statute is state jurisdiction over Indians and not the

Tribe concedes that federal law controls. "To the fullest extent possible not inconsistent with federal law, the Tribes may exercise their civil regulatory and adjudicatory powers. . . . " Ordinance No. 36-B, Amendment No. 4, *see* Intervenor's Brief, Appendix 2, App. 7. Therefore, the Tribe concedes that federal law, in this instance federal case law, will control the extent of tribal civil adjudicatory powers. The parameters on the Tribe's adjudicatory powers over non-Indians must be established by case law that provides guidance for the daily conflicts that exist in the judicial processes of the Tribe and the State of Montana.

C. Tribal Sovereignty Unaffected by Activities of the Litigants.

The Respondents and the Tribe beg the question by arguing that a careful analysis of tribal sovereignty was made and that it was concluded that Tribal sovereignty was affected since an Indian, albeit the mother of the decedent, was vicariously injured and therefore tribal sovereignty was automatically in question.[2]

The argument that sovereignty is automatically at issue circumvents the real question that must be addressed, *i.e.*, to what extent would tribal sovereignty be altered, divested, or diminished in the event that the

---

converse: "State jurisdiction over offenses committed by or against Indians in the Indian country."

[2] The facts are uncontroverted that the sole occupant and driver of the vehicle, Lynette Hinshaw, and the motorcyclist, Christian Mahler, were non-Indians and were the only individuals involved in the collision that precipitated this litigation.

present litigation were to be adjudicated in state court? As noted in the petition, the criteria of *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985), requires a careful examination of tribal sovereignty. *Id.* at 855-56. *See* Petitioner's Brief, p. 9. In order to avoid the analysis, the Intervenor and the Respondents simply state that a careful analysis of tribal sovereignty was conducted. *See* Respondents' Brief, p. 3, and Intervenor's Brief, pp. 24-25. However, there has been no showing of how the sovereignty of the Tribe is adversely affected if the matters in dispute in this litigation are adjudicated in state court.

To avoid the mandatory analysis prescribed in *Montana* and *National Farmers Union*, the Intervenor and the Respondents rely on *Larrivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980), a Montana Supreme Court decision that predates the holdings of *Montana* and *National Farmers Union* and the establishment of boundaries upon tribal civil adjudicatory jurisdiction over non-Indians. The *Larrivee* decision ought not to be considered as authority for the reason that it established concurrent state and tribal jurisdiction over an Indian concerning civil adjudicatory matters. *Larrivee* does not hold that Tribal court has concurrent jurisdiction over non-Indians. *See* Petitioner's Brief, p. 15.

II. No Authority Cited for Supplemental Jurisdiction.

The authority cited by the Respondents and the Intervenor for a supplementary jurisdictional concept is nonexistent. Instead of presenting to this Court case law, statutory authority, or any support whatsoever for a

determination that a tribal court should have supplementary jurisdiction over a non-Indian for the survivorship claim, the Respondents and the Intervenor use the circuitous argument of citing the District Court's decision as authority.

The Tribe also makes use of a clever euphemism, *i.e.*, "tribal descendant," to avoid the stark fact that the decedent Christian Mahler was not an enrolled member of the Tribe. The Tribe stretches the terminology in an attempt to reach a jurisdictional posture that extends the authority of the Tribal Court over a non-Indian whose actions have had no effect whatsoever upon Tribal sovereignty.

The bottom line issue in this litigation is power to adjudicate, which translates to the power to regulate. The Tribe understandably desires to have all encompassing adjudicatory power, and the non-Indians desire that the adjudicatory power be in the State of Montana. The real question to be resolved is what interest tribal government has in the resolution of nonconsensual disputes not governed by its internal law. It is submitted that such disputes have no effect upon tribal self-government (sovereignty) and therefore ought to be regulated in forums other than Tribal Court. The significant need for direction and guidance as to the parameters of jurisdictional boundaries mandates this Court's immediate attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 26th day of October, 1994.

LON J. DALE
MILODRAGOVICH, DALE,
STEINBRENNER & BINNEY, P.C.
P.O. Box 4947
Missoula, Montana 59806-4947
(406) 728-1455
Attorneys for Petitioner